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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **AUG 02 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as an insurance claims adjustment business. It seeks to employ the beneficiary permanently in the United States as an international marketing manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition.¹ Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a U.S. bachelor's degree or a foreign degree which is the foreign equivalent to a U.S. bachelor's degree as required by the ETA Form 9089. The director also determined that the petitioner had failed to establish its continuing ability to pay the proffered wage from the priority date onward.²

On appeal, counsel asserts that the beneficiary is fully qualified for the proffered position as required by the labor certification, and that the petitioner has established its continuing ability to pay the proffered wage from the priority date onward.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

¹ The petitioner provided a copy of the ETA Form 9089 with the instant petition. The original ETA Form 9089 was submitted with a previously filed Form I-140 petition and is in file of this action.

² The director noted in his February 28, 2013 decision denying the present petition that the petitioner had failed to respond to a Notice of Intent to Deny (NOID). On appeal, the petitioner submitted documentation showing that it filed a timely response to the director's NOID. The documentation provided in response to the director's NOID shall be fully considered in this decision.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

The petitioner claims that the beneficiary possesses the equivalent of a bachelor's degree in business administration from an accredited college or university in the United States based upon the beneficiary's prior work experience. Thus, the issue is whether it is appropriate to consider the beneficiary's years of experience as equivalent to an advanced degree.

In the instant case, Part H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's degree.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: Master's degree.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 60 months in a related international marketing position.
- H.14. Specific skills or other requirements:

"Any suitable combination of this education and experience will be considered acceptable.

Will accept education equivalency evaluation prepared by a qualified credential evaluation service."

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). See also 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees

must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."⁴ In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2).

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). Compare 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

The petitioner submitted an experiential evaluation from [REDACTED] dated January 21, 2003, which states that the beneficiary has the equivalent of a bachelor's degree in business administration from an accredited college or university in the United States based

⁴ Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

solely on the beneficiary's employment experience, including 40 years of experience from 1963 to the date of the evaluation. As noted above, for classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." The beneficiary may not qualify for member of the professions classification based upon his work experience alone.

The petitioner also submitted a diploma from [REDACTED] (graduation date June 15, 2006) indicating that the beneficiary held a Bachelor of Business Administration degree. Submitted with the diploma was a transcript which indicated that the petitioner completed six semesters of course work with a grade point average (GPA) of 3.19. The transcripts do not state any dates of class attendance. The director questioned the accreditation of [REDACTED] and asked the petitioner to address the issue in response to a Notice of Intent to Deny (NOID). In response to the director's NOID, the petitioner acknowledged that the beneficiary found this institution on line and submitted his credentials for evaluation (high school transcripts, resume and experience/recommendation letters). After payment of a fee, he then received the diploma and transcripts in the mail. The beneficiary did not attend classes (online or otherwise) at the university and the diploma was issued solely based on the aforementioned documentation submitted to the institution and payment of a fee. The documentation provided by [REDACTED] does not state that the diploma was issued based on an evaluation of the beneficiary's work experience and does not indicate upon what basis the transcript of classes was prepared. [REDACTED] is not a regionally accredited university in the United States as listed by the U.S. Department of Education

The AAO will not consider a degree from an unaccredited college or university to satisfy the definition of an advanced degree. As stated by the Department of Education (DOE) on its website:

The [DOE] does not accredit educational institutions and/or programs. However, the Secretary of Education is required by law to publish a list of nationally recognized accrediting agencies that the Secretary determines to be reliable authorities as to the quality of education or training provided by the institutions of higher education and the higher education programs they accredit. An agency seeking [recognition must meet the] procedures and criteria for the recognition of accrediting agencies, as published in the *Federal Register*

The United States has no . . . centralized authority exercising . . . control over postsecondary educational institutions in this country. . . . [I]n general, institutions of higher education are permitted to operate with considerable independence and autonomy. As a consequence, American educational institutions can vary widely in the character and quality of their programs.

[T]he practice of accreditation arose in the United States as a means of conducting nongovernmental, peer evaluation of educational institutions and programs. Private educational associations of regional or national scope have adopted criteria reflecting the qualities of a sound educational program and have developed procedures for

evaluating institutions or programs to determine whether or not they are operating at basic levels of quality.

. . . Accreditation of an institution or program by a recognized accrediting agency provides a reasonable assurance of quality and acceptance by employers of diplomas and degrees.

www.ed.gov/print/admins/finaid/accred/accreditation.html.

The DOE's purpose in ascertaining the accreditation status of U.S. colleges and universities is to determine their eligibility for federal funding and student aid, and participation in other federal programs. Outside the federal sphere, the Council for Higher Education Accreditation (CHEA), an association of 3,000 degree-granting colleges and universities, plays a similar oversight role. As stated on its website:

Presidents of American universities and colleges established CHEA [in 1996] to strengthen higher education through strengthened accreditation of higher education institutions

CHEA carries forward a long tradition that recognition of accrediting organizations should be a key strategy to assure quality, accountability, and improvement in higher education. Recognition by CHEA affirms that standards and processes of accrediting organizations are consistent with quality, improvement, and accountability expectations that CHEA has established. CHEA will recognize regional, specialized, national, and professional accrediting organizations.

Accreditation, as distinct from recognition of accrediting organizations, focuses on higher education institutions. Accreditation aims to assure academic quality and accountability, and to encourage improvement. Accreditation is a voluntary, non-governmental peer review process by the higher education community The work of accrediting organizations involves hundreds of self-evaluations and site visits each year, attracts thousands of higher education volunteer professionals, and calls for substantial investment of institutional, accrediting organization, and volunteer time and effort.

www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf.

The DOE and CHEA recognize six regional associations that accredit U.S. colleges and universities. None of these regional associations list [REDACTED] as an accredited institution. As nothing shows that [REDACTED] is accredited, or that the beneficiary attended any classes to obtain the degree, the [REDACTED] documentation is deemed to be of no evidentiary value and will not be considered in these proceedings.⁵

⁵ Even if the [REDACTED] degree were accepted, and it is not, the degree was issued on June

Because the beneficiary has neither (1) a U.S. master's degree or foreign equivalent degree in business administration nor (2) a U.S. baccalaureate degree or foreign equivalent degree in business administration and five years of progressive experience in the specialty, or the related field of international marketing as permitted by the ETA Form 9089, he does not qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act. On this ground alone, the petition cannot be approved.

The petition is therefore deniable on two grounds:

1. The beneficiary does not have a U.S. master's degree or a foreign equivalent degree, or a U.S. bachelor's degree or foreign equivalent degree and five years of qualifying experience, and thus is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act.
2. The beneficiary does not meet the minimum educational requirement(s) of the labor certification to qualify for the job offered.

The director also determined that the petitioner had failed to submit sufficient documentation to establish its continuing ability to pay the proffered wage from the priority date onward. As previously noted, the director did not have at his disposal the petitioner's response to the director's NOID when he issued his February 28, 2013 decision denying the petition. The documentation submitted with the petitioner's response to the director's NOID, which is now being considered, would show the petitioner's ability to pay the proffered wage from the March 28, 2009 priority date onward.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.⁶ If the petitioner's net income or net current assets is

15, 2006. The priority date of the labor certification is March 28, 2009. Thus, it would not be possible for the beneficiary to have obtained five years of progressively responsible experience as required by the labor certification between the date the degree was issued and the priority date. Additionally, nothing in the record shows the exact dates the beneficiary served as Consul General for the Republic of Ecuador, experience upon which the beneficiary relies in claiming his degree equivalence.

⁶ See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010).

not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, the petitioner submitted W-2 Forms for years 2009 through 2012 which show that it paid the beneficiary wages in excess of the \$50,190 proffered wage in each year. Further, the petitioner's tax returns for years 2009 through 2011 state either net income or net current assets which exceed the beneficiary's proffered wage. Thus, the petitioner's tax returns would also establish its ability to pay the proffered wage in this instance.

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.